

APPEAL NO. 042086
FILED OCTOBER 11, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 19, 2004. The hearing officer resolved the disputed issue by deciding that the respondent's (claimant) impairment rating (IR) could not be determined at this time and that the Texas Workers' Compensation Commission (Commission) appoint an alternate designated doctor who is properly qualified to evaluate the claimant's compensable injury. The appellant (carrier) appealed, arguing that the hearing officer's finding that the designated doctor abandoned his role as a designated doctor is against the great weight and preponderance of the evidence. The carrier argues that the designated doctor exercised his discretion by deciding not to apply Commission Advisory 2003-10, signed July 22, 2003, and explained his reasons for so deciding.

DECISION

Affirmed in part on other grounds and reversed and remanded in part.

The parties stipulated that on _____, the claimant sustained a compensable injury to his lower back; that the claimant reached maximum medical improvement on December 29, 2003; and that Dr. E was the designated doctor. It was undisputed that the claimant had a multilevel fusion. The only IR in evidence was from the designated doctor.

The evidence reflects that the designated doctor examined the claimant on December 29, 2003, and assessed an 11% IR under Table 75 Section (II)(E) with the addition of 1% for multiple levels as provided in Table 75 Section (II)(F) of the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). The AMA Guides provide on page 3/112 that the range of motion (ROM) model uses a diagnosis-based component, based on Table 75 and a component based on any spinal nerve deficit.

A letter of clarification was sent to the designated doctor asking him to review Advisory 2003-10 and consider amending his certification to "reflect a 20% [IR] under category IV for multi-level fusion." The designated doctor responded to the letter of clarification stating Diagnosis-Related Estimate (DRE) Category IV refers to loss of motion segment integrity as defined and segment with structural compromise as with fractures or dislocations. The designated doctor declined to change the IR previously assessed, stating that the claimant does not have any evidence of spine instability. However, no explanation was given as to why the DRE model was not used to assess an IR.

In Texas Workers' Compensation Commission Appeal No. 032399-s, decided November 3, 2003, we said that, for hearings held after July 22, 2003, involving IRs for spinal surgery that would be affected by Advisory 2003-10, it is error not to consider and apply that advisory. However, in subsequent cases a determination of IR has been affirmed where it was clear that the designated doctor considered Advisory 2003-10 but declined to assess a rating based on DRE Category IV, where the hearing officer found that the great weight of the other medical evidence was not contrary to the report, or amended report, of the designated doctor. See Texas Workers' Compensation Commission Appeal No. 041894, decided September 22, 2004 and Texas Workers' Compensation Commission Appeal No. 041190, decided July 7, 2004. It was error for the hearing officer to find that the designated doctor abandoned his role as a designated doctor in this case solely because he declined to place the claimant in DRE Category IV after considering Advisory 2003-10.

In Texas Workers' Compensation Commission Appeal No. 030288-s, decided March 18, 2003, the Appeals Panel held that although there are instances when the ROM model may be used, "the use of the [DRE] Model is not optional and is to be used unless there is a specific explanation why it cannot be used." In determining that "use of the DRE Model is not optional and is to be used unless there is a specific explanation why it cannot be used," Appeal No. 030288-s focused on language from page 3/94 of the AMA Guides 4th edition that states:

The evaluator assessing the spine should use the Injury Model, if the patient's condition is one of those listed in Table 70 (p.108). That model, for instance, would be applicable to a patient with a herniated lumbar disk and evidence of nerve root irritation. If none of the eight categories of the Injury Model is applicable, then the evaluator should use the [ROM] Model.

The first sentence in this paragraph suggests that if a claimant's condition is one of those listed in Table 70, then the claimant will fall within one of the DRE categories. In his response to the Commission's request for clarification, the designated doctor did not clarify why the claimant did not fall into one of the DRE categories with regard to his lumbar spine. In the absence of such an explanation, we are without sufficient information to determine whether the designated doctor's use of the ROM model to determine that the claimant's IR was appropriate. See Texas Workers' Compensation Commission Appeal No. 031874-s, decided September 5, 2003. Accordingly, we remand the case to the hearing officer to seek additional clarification from the designated doctor regarding the claimant's lumbar spine IR. The designated doctor should be asked if the claimant's condition is listed in Table 70. If the designated doctor determines that the claimant's condition is listed in Table 70, then he should be asked to determine if the claimant falls within any of the DRE categories that correspond to that condition. If he decides that the claimant does not fit into any of the DRE categories, the designated doctor should provide a detailed explanation of why he does not fall within the categories and then he can turn to the ROM model either to calculate the claimant's IR or as a differentiator to assist in determining placement within one of the

DRE categories (see Texas Workers' Compensation Commission Appeal No. 022509, decided November 21, 2002). We note that if the designated doctor sufficiently explains why the ROM model is necessary to assess impairment, we note Table 75 is not the only criteria used to assess impairment based on the ROM model. If the designated doctor does not or cannot provide the requested information, then the hearing officer should consider whether the appointment of a second designated doctor is warranted in this case.

The hearing officer's determination that the claimant's IR cannot be determined at this time is affirmed, albeit on other grounds. The hearing officer's decision that the designated doctor refuses to act as a proper designated doctor in this case is reversed. The hearing officer's decision that the Commission is required to appoint an alternate designated doctor is reversed and remanded for further proceedings consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERICAN ZURICH INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**LEO MALO
ZURICH NORTH AMERICA
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.**

Margaret L. Turner
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Veronica L. Ruberto
Appeals Judge